

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

AND THE DELAWARE ENERGY OFFICE

IN THE MATTER OF INTEGRATED RESOURCE)
PLANNING FOR THE PROVISION OF STANDARD)
OFFER SUPPLY SERVICE BY DELMARVA POWER &)
LIGHT COMPANY UNDER 26 DEL. C. § 1007(c) &) PSC DOCKET NO. 06-241
(d): REVIEW AND APPROVAL OF THE REQUEST)
FOR PROPOSALS FOR THE CONSTRUCTION OF NEW)
GENERATION RESOURCES UNDER 26 DEL. C.)
§ 1007(d) (OPENED July 25, 2006))

FINDINGS AND OPINION SUPPLEMENTING ORDER NO. 7106

BEFORE:

ARNETTA MCRAE, Chair
JAYMES B. LESTER, Commissioner
JOANN T. CONAWAY, Commissioner
J. DALLAS WINSLOW, Commissioner
JEFFREY J. CLARK, Commissioner

and

PHILIP J. CHERRY, Director of Policy &
Planning, Delaware Department of Natural
Resources and Environmental Control,
Delaware Energy Office

APPEARANCES:

For the Staff of the Delaware Public Service Commission ("Staff"):

JAMES McC. GEDDES, ESQUIRE
Ashby & Geddes
Rate Counsel

For the Independent Consultant:

BARRY J. SHEINGOLD
New Energy Opportunities, Inc.

For the Division of the Public Advocate ("DPA"):

G. ARTHUR PADMORE, PUBLIC ADVOCATE
JOHN CITROLO

For Delmarva Power & Light Company ("DP&L"):

ANTHONY C. WILSON, ESQUIRE, Associate General Counsel
MARK FINFROCK, Director of Risk Management

For Bluewater Wind LLC:

THOMAS P. MCGONIGLE , ESQUIRE
Wolf, Block, Schorr & Solis-Cohen

PETER MANDELSTAM, Bluewater Wind LLC

For Themselves:

JEREMY FIRESTONE, Ph.D. and WILLETT KEMPTON, Ph.D.

I. BACKGROUND

1. On October 31, 2006, the Delaware Public Service Commission (the "Commission") and the Delaware Energy Office (the "Office") (together, the "Commission/Office") entered Findings, Opinion, and Order No. 7066 ("Order No. 7066"), reflecting their decision on the appropriate components of a Request for Proposals ("RFP") to solicit bids to provide capacity and energy for the Standard Offer Service ("SOS") customers of Delmarva Power & Light Company ("DP&L") under long-term contracts, pursuant to the "Electric Utility Retail Customer Supply Act of 2006" (the "EURCSA"). Order No. 7066 was subsequently modified in certain respects by Order No. 7081 dated November 21, 2006.

2. On or about November 30, 2006, Professors Jeremy Firestone and Willett Kempton filed a Petition for Rehearing and Reconsideration (the "Petition"), in which they raised the following issues: (1) the limited amount of time they had before oral argument on October 17, 2006 to respond to the redlined RFP; (2) the Commission/Office failed to consider every argument and comment that they made; (3) Order No.

7066 was not consistent with the Commission/Office deliberations on October 17, 2006 because the written order reflects a greater number of votes than were actually taken; and (4) Order No. 7066 misstated their position on the appropriate weighting to be afforded to the site development criterion.

3. On December 4, 2006, the Executive Director of the Public Service Commission notified all interested parties of the filing of the Petition and established a deadline of 4:30 PM on December 12, 2006 for responses to the Petition.

4. On December 4, 2006, Green Delaware ("GD") filed a comment addressing: (1) the role of the Delaware Energy Office, both with respect to the Petition and more generally; and (2) its agreement with the issues raised in the Petition.

5. On December 12, 2006, the League of Women Voters (which had not participated in the proceedings prior to this point) filed a response in support of the Petition, stating that: (1) the relative weights of the selection criteria in the RFP were inconsistent with 26 Del. C. § 1007; (2) that price, which was not mentioned in 26 Del. C. § 1007, was assigned 33 points, whereas price stability was only assigned 20 points, reduction in environmental impacts was only assigned 14 points; and benefits of adopting new and emerging technology were only assigned a total of 5 points; and (3) the future costs of CO2 emissions and other pollutants were not considered in the price criterion.

6. On December 12, 2006, the State Treasurer (who also had not participated in the proceedings prior to this point) filed a letter

with the Commission in support of the Petition, stating his concerns regarding Order No. 7066: (1) the weightings assigned to price versus price stability did not seem to be consistent with the statute; (2) the weighting assigned to environmental impact in the form of greenhouse gases was insufficient in light of potential federal legislation that would restrict or economically penalize power plants that emit CO₂; (3) the effect of global warming and the potential economic effect efforts to remedy same would have on DP&L customers; (4) the RFP appeared to take a shorter-term view of cost-effectiveness; and (5) evaluation of bids over the lifetime of the facilities rather than just the bid contract period.

7. On December 12, 2006, the Commission Staff filed a response in opposition to the Petition that specifically addressed the issues raised therein, arguing that: (1) all of the participants worked under the same time constraints imposed by the EURCSA; (2) the Commission/Office were not required to specifically address each and every comment or objection raised by each and every party, but even if they were, all of Professors Firestone's and Kempton's comments had been considered; (3) Order No. 7066 was not inconsistent with the transcript of the October 17, 2006 deliberations, but even if it was, the case law provides that the written order is controlling; and (4) although Order No. 7066 misstated Professors Firestone's and Kempton's position on the weighting of the site development criterion, this misstatement was immaterial since correctly stating the position in Order No. 7066 would not have changed the Commission/Office's determination of the issue.

8. The Commission/Office met on December 19, 2006 to consider the Petition, to hear oral argument from the commenting parties and any other parties that wished to be heard, and deliberate in open session. On that date, the Commission/Office denied the Petition and entered Order No. 7106, which stated that the Commission/Office would enter an opinion at a later date detailing their reasons for denying the Petition. This is the Commission/Office's Findings and Opinion supporting the denial of the Petition.

II. DISCUSSION

9. We are cognizant of the arguments made that we have assigned too much weight to price. However, as we discussed in Order No. 7066, we are well aware of the genesis of the EURCSA, which was the extremely high rate increases to customers that resulted when price caps were removed and market-based prices went into effect as a result of the Restructuring Act of 1999. In fact, EURCSA specifically declares that "it is the policy of the State that electric distribution companies" regulated by the Commission must conduct IRP "for the purpose of evaluating and diversifying their electric supply options, efficiently and at the lowest cost to their customers." See 26 Del. C. § 1002(4) (emphasis added). We note that EURCSA explicitly instructs that the RFP process be "[p]art of the initial IRP process" (see 26 Del. C. § 1007(d)), making it evident that cost was a critical component of the RFP evaluation. We specifically noted in Order No. 7066 at ¶ 40 that the EURCSA instructs the State Agencies to select the most cost-effective projects that meet the EURCSA criteria. Id. ("Such RFP shall also set forth proposed selection criteria based on

the cost-effectiveness of the project in producing energy price stability ..."); Id. at § 1007(c)(1) ("In its IRP, DP&L shall systematically evaluate all available supply options during a ten-year planning period in order to acquire sufficient, efficient, and reliable resources over time to meet its customers' needs at a minimal cost"); Id. at § 1007(c)(1)2 ("The IRP must investigate all potential opportunities for a more diverse supply at the lowest reasonable cost"). We further observed that price stability is important, but only if the level of the stable price is reasonable (that is, it is "cost-effective"), and that the proposals that were likely to be successful were those that achieve the greatest long-term system benefits as enumerated in the EURCSA in the most cost-effective manner. (Order No. 7066 at ¶ 43). Therefore, price was contemplated as an essential criterion, and we further believe that price was the driving force in the enactment of the EURCSA. In light of this, we believe that the assignment of 33 points to the price criterion is justified, and do not believe it necessary to reconsider our decision on this issue.

10. We are also cognizant of the arguments that potential future legislation regarding CO2 and other pollutants could result in DP&L's customers being forced to pay higher prices over time. However, the mere fact that DP&L will not be responsible for paying carbon or other pollutant taxes does not necessarily mean that that burden will be shifted to DP&L's customers. We adopted the Independent Consultant's recommendation, which was to provide bidders with two options. First, a bidder could assume the change-in-law risk

in its entirety and its bid would be so treated in the economic (i.e., price) evaluation. Alternatively, a bidder would assume compliance costs other than those in the nature of a tax, and, in the event of a future carbon or Btu tax of general applicability, a bidder could seek only to recover the amount of such tax attributable to the average cost that would be assessed on generators in the relevant market based on average emissions. Specifically, the IC recommended limiting the seller's ability to recover costs imposed on it by such taxes only to the extent of the amount of tax per MWh attributable to the average level of emissions from all facilities in the PJM Classic market. In this manner, a bidder would accept the financial risk associated with a Btu or carbon tax that it would contribute to greenhouse gas emissions to an extent greater than the market norm. This is reasonable from an economic standpoint because market prices would be expected to rise based on average emissions and it is reasonable for a seller to be at risk for the excess amount. The IC noted that a bidder that takes the entire risk and a bidder with no emissions will score better in the price and price stability categories, all other things being equal. And if such a bidder scores better in these categories (which together comprise 53 of the 100 available points), that bidder's project is more likely to be selected. (Order No. 7066, ¶¶ 218, 220). We believe our original decision properly balances the competing interests of bidders, customers, and DP&L without unduly favoring one constituency at the expense of another.

11. As for the Petition's allegations that we did not consider each and every argument or comment raised by Professors Firestone and Kempton, Professor Firestone contended at oral argument that he was not suggesting that the Commission/Office had to address every argument the parties made. Instead, he contended that "neither the Staff, nor the independent consultant, nor the Commission, nor the Energy Office ever considered, let alone address, our contentions that are embodied in the redlined RFP." (12/19/06 Transcript at 659-660). After we assured Professors Firestone and Kempton that we had indeed received and read their comments to the redlined RFP, Professor Firestone changed track, arguing that perhaps the other parties did not have full access to their comments. With all due respect to Professors Firestone and Kempton, whether other parties had access to their comments is not relevant to whether we, the Commission/Office, read and considered Professors Firestone's and Kempton's comments. We did so.

12. Furthermore, with respect to the posting of a redlined RFP, we note that neither the EURCSA nor the original schedule provided for the filing of a redlined RFP. The Independent Consultant submitted a redlined RFP as a convenience to the participants. There was no requirement that such a redlined RFP be submitted, and Professors Firestone and Kempton would have no basis for contending that one *should* have been provided if the Independent Consultant had not provided it. Thus, we do not believe that this contention provides any basis for granting the Petition.

13. To the extent that Professors Firestone and Kempton are arguing that somehow the Commission/Office had a duty to address every single argument made by every single party in its written order, they have provided no authority that suggests that we are required to do so. Staff, on the other hand, has provided authority that squarely states that we need not consider each and every specific argument or comment that a party makes. *State of S.C. ex rel. Tindal v. Block*, 717 F.2d 874, 885 (4th Cir. 1983), cert. denied sub nom. *South Carolina v. Block*, 465 U.S. 1080, 104 S.Ct. 1444, 79 L.Ed. 2d 764 (1984); see also *Consumers' Union of United States, Inc. v. Consumer Product Safety Commission*, 491 F.2d 810, 812 (2d Cir. 1974) (formal opinion specifically covering all rejected alternatives not required in informal rulemaking proceeding); *GTE Sylvania Inc. v. Consumer Product Safety Commission*, 404 F. Supp. 352, 368 n.70 (D. Del. 1975) (in informal administrative proceeding, it is not mandatory that an agency's substantially contemporaneous writing relied upon and adopted by the Commission specifically reject every contention). Rather, the agency's written decision must simply enable a reviewing court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them the way it did." *State of South Carolina*, supra at 886 (citations omitted). Order No. 7066 did consider and address the primary areas of concern to every party, and that is all that is required.

14. Professors Firestone and Kempton argue that the cases cited in Staff's response are not binding on the Commission/Office because they are not Delaware cases. We observe that one of the cases that

Staff cited is indeed a Delaware case, albeit a federal case. While we agree with Professors Firestone and Kempton that we are not bound to accept the legal conclusions of those courts, we do find the reasoning of those courts to be persuasive.

15. With respect to Professors Firestone's and Kempton's contention that Order No. 7066 is inconsistent with our deliberations in the Order (i.e., that Order No. 7066 constitutes a "post hoc rationalization" for decisions that the Commission/Office made on October 17, 2006), we *did* vote to adopt the Independent Consultants' Report as our decision, and we addressed certain issues individually. We do not understand Professors Firestone's and Kempton's argument that the Commission/Office did not vote to adopt the Independent Consultant's Report and Recommendations for the reasons set forth by the Independent Consultant, just that the Commission/Office did not do so for each and every one of those issues. We believe this is a distinction without a difference, and does not render the Order inconsistent with the Commission/Office's deliberations. The Commission/Office adopted the Independent Consultant's Report and Recommendations on those issues, and Order No. 7066 so reflects. The Commission/Office believed that it made for a cleaner Order to lay the issues out separately. If anything, this furthers judicial review rather than hinders it.

16. Furthermore, there is no requirement that the final Order track chronologically with the Commission/Office's deliberations. The general rule is that agency decisions (and the bases therefore) are freely changeable up to the point of announcement. 2 Am. Jur. 2d,

Administrative Law, §373 (2004). In *LO Shippers Action Committee v. Interstate Commerce Commission*, 857 F.2d 802 (D.C. Cir. 1988), the Court of Appeals for the District of Columbia reiterated this general rule in rejecting an appellant's position that the vote at the public meeting was the agency's actual decision, stating that "the [agency's] formal opinion is its decision because the commissioners retained full authority to approve, disapprove or modify it until published." Id. at 805. In *PLMRS Narrowband Corp. v. Federal Communications Commission*, 182 F.3d 995 (D.C. Cir. 1999), that Court further explained:

It is fundamental that "[a]gency opinions, like judicial opinions, speak for themselves." *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994). Rendered at the conclusion of all the agency's processes and deliberations, they represent the agency's final considered judgment upon matters of policy the [Legislature] has entrusted to it. Accordingly, "[w]here an agency has issued a formal opinion or a written statement of its reasons for acting, transcripts of agency deliberations at Sunshine Act meetings should not routinely be used to impeach that written opinion." *Kansas State Network v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983).

Id. at 1001. Again, although these are not Delaware cases, we find the reasoning of these courts persuasive.

17. Thus, where an agency has acted in a written order, the transcript of its deliberations cannot be used (except in extreme circumstances not present here) to impeach its written order. We could have simply gone through the Independent Consultant's Report and taken a vote on each and every issue addressed therein, and this would have had the same result as the procedure that we actually followed.

18. Professor Firestone next argued at oral argument (a contention that was not in the Petition) that in issuing Order No. 7066, "Rate Counsel" ignored Commission Order No. 7003 in this docket, which stated that the Commission would hear oral argument and take final action on DP&L's proposed RFP on October 17, 2006. (12/19/06 Transcript at 664-666). Professors Firestone and Kempton either misunderstand or are unaware of the Administrative Procedures Act ("APA"). The APA requires the agencies subject to its purview (and this Commission is such an agency) to record its case decision in a final order, which is to include a brief summary of the evidence, findings of fact based upon the evidence, conclusions of law, any other conclusions required by the law of the agency, and a statement of the agency's determination or action on the case. 29 Del. C. § 10128(b). Thus, our oral deliberations in open session are not our "final action;" rather, our final action is embodied in our written opinion and order.

19. As for the contention that time was too short, unfortunately that was a result of the constraints imposed by the EURCSA. Certainly, we would have liked more time to consider and address the very important issues raised by this proceeding, and would like to have been able to give the participants more time to do so. But the General Assembly imposed specific deadlines by which certain activities were to be accomplished, and we were bound by those deadlines. We note that every other participant in the proceedings was subject to the same time constraints, and so no one party was disadvantaged any more than any other party.

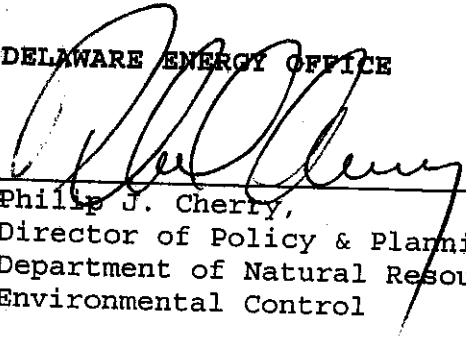
20. Next, we acknowledge that Order No. 7066 misstated Professors Firestone's and Kempton's position on the appropriate weighting to be given to the site development criterion. That was, obviously, a mistake in drafting, which unfortunately was not caught prior to our signing of the order. But even if Order No. 7066 had stated their position correctly, we note that we adopted the Independent Consultant's recommendation on this issue, and we further note that Professors Firestone and Kempton did not ask that this issue be specifically addressed at the October 17, 2006 meeting (although they did ask that the Commission/Office specifically address other issues). Thus, our position would not have changed had Order No. 7066 correctly stated Professors Firestone's and Kempton's position on this issue.

21. Last, Professor Firestone contended at oral argument that the Commission's rules applied to allow the Commission to hear the Petition. This contention is moot, as the Commission/Office did consider the Petition on its merits. Thus, to the extent there were any questions as to whether our rules would permit us to consider the Petition, that question was resolved in favor of the Commission/Office hearing and considering the Petition on its merits.

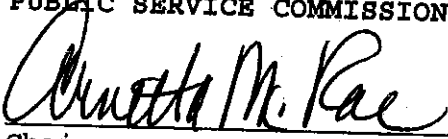
22. In short, we believe that Order No. 7066 reflects our thought process as we deliberated in open session on October 17, 2006, and thus vote to deny the Petition. (UNANIMOUS).

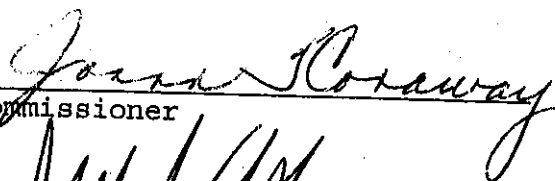
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AND THE DELAWARE ENERGY OFFICE

DELAWARE ENERGY OFFICE

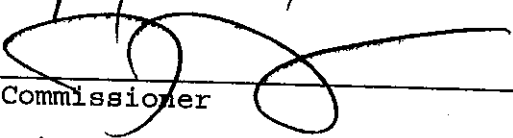

Philip J. Cherry,
Director of Policy & Planning
Department of Natural Resources &
Environmental Control

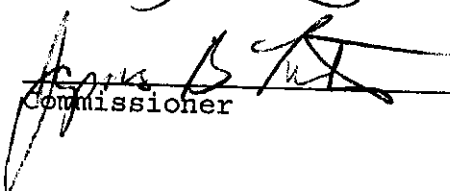
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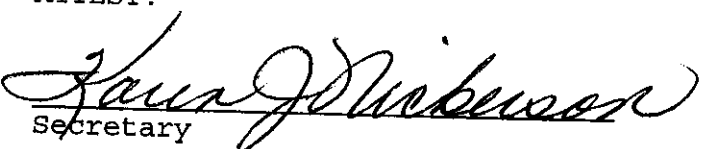

Commissioner


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Commissioner

ATTEST:


Secretary